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No. 89-40

In the Supreme Court

OF THE

United States

OCTOBER TERM 1989

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
vs.
RICHARD D. BOYER,
Respondent.

On Petition For a Writ of Certiorari To the Supreme Court of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22pp

TABLE OF CONTENTS

Page

I.

INTRODUCTION 1

A. The California Supreme Court's Opinion 2

B. Summary of "Police Misconduct" 4

II.

NEITHER OF THE CALIFORNIA SUPREME COURT'S INDEPENDENT BASES FOR ITS HOLDING, REACHED AFTER REVIEWING A LENGTHY FACTUAL RECORD, PRESENTS A QUESTION FOR THIS COURT TO REVIEW 13

A. The Court's Fourth Amendment Analysis Was Appropriate 13

B. The Court's *Miranda* Analysis Was Appropriate 16

III.

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Page(s)

Edwards v. Arizona, 451 U.S. 477 (1981) 2, 16, 17, 18

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Oregon v. Bradshaw, 462 U.S. 1039 (1983) 19

People v. Boyer, 48 Cal.3d 247, *modified*, 48 Cal.3d 972a (1989) ..... *passim*

Rhode Island v. Innis, 446 U.S. 291 (1980) 17, 18

Swisher v. Brady, 438 U.S. 204 (1978) 4

United States v. Carter, 566 F.2d 1265 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978) 4

United States v. Walker, 624 F.Supp. 103 (D. Md. 1985) 18

United States v. Webb, 755 F.2d 382 (5th Cir. 1985) 18

United States Constitution

Fourth Amendment ..... *passim*

Fifth Amendment ..... *passim*

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I.
INTRODUCTION

The Petition for Certiorari of the State of California ("State") should be denied. After considering a lengthy, fact-bound record, the California Supreme Court reversed Mr. Boyer's conviction and death sentence for two independent reasons. That court found that there was "flagrant" and "aggravated" "police misconduct" in violation of both the Fourth Amendment and *Miranda v. Arizona,* 384 U.S. 436 (1966). Neither of these independent reasons provides a ground for this Court to hear the case.

The State's petition presents no important federal question for review. The major reason the State proffers in seeking review is its contention that the California Supreme Court applied a subjective standard in determining that the police had seized Mr. Boyer. But the State does not and cannot cite any portion of the court's opinion applying a subjective standard because the court expressed and used an objective, reasonable-man standard. The State's reargument of the facts also ignores portions of the record unfavorable to it, including the finding at the preliminary hearing that Mr. Boyer was "in a posture of custody with the police." (CT 210).[1]

Nor does the Court's *Miranda* analysis present any substantial federal question for review, both because the Court's interpretation of initiation under *Edwards v. Arizona,* 451 U.S. 477 (1981), was correct and because the Court had another independent reason for finding *Miranda* error, to wit, the police interrogated Mr. Boyer after he invoked his right to an attorney. Finally, review is inappropriate because the flagrant police misconduct would require reversal of Mr. Boyer's conviction and death sentence on other grounds as well, which the California Supreme Court did not have to reach.

A. The California Supreme Court's Opinion.

Prior to Mr. Boyer's second trial, Mr. Boyer moved to suppress, among other things, a lengthy tape-recorded (and highly unreliable) confession.[2] After approximately

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[1]Mr. Boyer uses "CT" to cite to the Clerk's Transcript, "RT1" to cite to the Reporter's Transcript of his first trial, and "RT2" to cite to the Reporter's Transcript of his second trial.

[2]The jury in Mr. Boyer's first trial deadlocked and was unable to convict Mr. Boyer of any crime. The trial court then declared a mistrial. (RT1 3148) In the second trial, the trial judge refused to

seven days of hearings on Mr. Boyer's motions to suppress, the trial court denied all such motions by minute orders without any statement of reasons.

On appeal the California Supreme Court, in reversing Mr. Boyer's conviction and death sentence, held that Mr. Boyer's "inculpatory statement to the police was obtained in flagrant violation of the Fourth Amendment and *Miranda*" and that the prosecution's introduction of this evidence in its case-in-chief "was prejudicial by any applicable standard." *People v. Boyer,* 48 Cal.3d 247, 256 (1989). Concerning the Fourth Amendment error, the California Supreme Court found that "[t]he police misconduct leading to [Mr. Boyer's] inculpatory statement was aggravated" and that his "statement was the direct product of the illegal seizure." *Id.* at 262. As to the *Miranda* error, the Court found that the "interrogating detective pointedly ignored defendant's unequivocal attempts to assert his *Miranda* rights to silence and to counsel," and "began a new conversation about the case under circumstances reasonably calculated to elicit an incriminating response." *Id.* at 262. "For each of these reasons independently," Mr. Boyer's "statement was inadmissible at trial as proof of his guilt." *People v. Boyer,* 48 Cal.3d 247, 262 (1989).

On May 22, 1989 the California Supreme Court denied the State's petition for rehearing. On June 21, 1989 the California Supreme Court denied the State's application for a stay pending its application for certiorari, and on July 21, 1989 Justice O'Connor denied the State's application for a stay of the California Supreme Court's judg-

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give the second jury a key defense instruction over which it is clear that the first jury had long debated because the jury sent the trial judge three notes inquiring about that instruction. Without this key instruction, the second jury convicted Mr. Boyer.

ment. This Court may take judicial notice that the State arraigned Mr. Boyer on July 24, 1989 in California Superior Court, Department 5, County of Orange, and a new trial date is set for March 1990.[3]

B. Summary of "Police Misconduct"

The State ignores important facts on which the judgment of the California Supreme Court is based, and Mr. Boyer, therefore, submits the following partial summary of facts relevant to the *Miranda* and Fourth Amendment violations.

On December 14, 1982, the police were investigating the killing of a Fullerton couple, the Harbitzes. After darkness fell, four plain-clothed police officers — concededly without probable cause to arrest — went to Mr. Boyer's home.[4] Two of the officers knocked on the front door while

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[3]At the same time the State pursues this petition for a writ of certiorari, the State has begun proceedings to retry Mr. Boyer in California Superior Court for the County of Orange. Mr. Boyer objects to the State's simultaneous conduct of these two offensives against him; the State is forcing Mr. Boyer to respond on two fronts, which Mr. Boyer contends is or should be violative of interests protected by the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *Cf. Swisher v. Brady*, 438 U.S. 204, 216 (1978) ("The Double Jeopardy Clause also precludes the prosecutor from 'enhanc[ing] the risk that an innocent defendant may be convicted,' [citation omitted] by taking the question of guilt to a series of persons or groups empowered to make binding determinations"); *United States v. Carter*, 566 F.2d 1265, 1271 (5th Cir.), *cert. denied*, 436 U.S. 956 (1978) ("Although the Government has an obligation to prosecute cases zealously, the Government's primary obligation is to try each case fairly and with due regard for the accused's rights").

[4]The State conceded in the courts below that the police lacked probable cause to arrest Mr. Boyer. *E.g., People v. Boyer*, 48 Cal.3d 247, 262 (1989) (Mr. Boyer's "detention was improper under the

the other two "cover[ed] the rear." (RT1 6, 103-04). Mr. Boyer's front door was not working, and Officer Lewis testified that after Mr. Boyer walked out his back door, the police at the rear of the house said, "Police officers, freeze." (RT1 106). The two officers at the rear of the house walked Mr. Boyer to the front of his home, and one of them said that Mr. Boyer "ran out the back." (RT1 106).

The woman with whom Mr. Boyer lived became hysterical during some discussion with the police about transporting Mr. Boyer from his home to the police station for an hour interrogation and travel time of an hour each way. (RT1 32-33, 38, 112-114). After this, the police frisked Mr. Boyer and told him to sit in the back of an unmarked police vehicle. (CT 1405, RT1 252). Mr. Boyer was not told that he did not have to go to the police station. (RT1 149). At the preliminary hearing, the court found that at this point Mr. Boyer was "in a posture of custody with the police." (CT 210).

When Officers Lewis and Allred arrived at the Fullerton police station with Mr. Boyer, Officer Lewis immediately took Mr. Boyer to a closed interview room. (RT1 119, 257). The room was small, containing two chairs, a small table, and a two-way mirror. (RT1 257). Both officers were present in the interrogation room. (RT1 447). Officer Lewis advised Mr. Boyer of his *Miranda* rights and twice asked, with those rights in mind, whether Mr. Boyer was willing to talk to the police about the "charges" against him. (RT1 217.1). The police surreptitiously tape-recorded the interrogation.

Fourth Amendment because, as the People concede, the police had no legal ground for the restraint.").

After questioning Mr. Boyer about where he was on the evening of the killings, Officer Lewis told Mr. Boyer that a son of the deceased couple had accused Mr. Boyer of the killings. Mr. Boyer denied having killed the Harbitzes, and Officer Lewis then launched into a lengthy and highly accusatory interrogation.

In the face of Mr. Boyer's repeated denials of guilt, Officer Lewis repeatedly used an interrogational technique in which he told Mr. Boyer that the police knew he had killed the Harbitzes and could prove it, though the police had no such evidence. The thrust of the entire interrogation was that the police had the evidence to convict Mr. Boyer of murder, believed Mr. Boyer to be a guilty liar, and the only reason for the interrogation was to find out why Mr. Boyer had done it. Officer Lewis made such statements as "We've got the proof[;] [y]ou're gonna fall on this one Rich[;] [i]t's heavy duty to fall first time around on one like this" (RT1 217.25); "We know how you killed them." (RT1 217.26). When Mr. Boyer asked what evidence implicated him, Officer Lewis said: "Witnesses. You're gonna find that out when you go to court. We're just trying to find out why you did it."(RT1 217.28).[5]

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[5]Samples of the lengthy, highly accusatory interrogation include the following:

Officer Lewis: ... And what I'm here for (cough) is to try to understand why you did it. That's where we're at. I want to know why you did it. This thing of saying "No, no" I — I already know you did it. You know? I've been at this job too long. I wouldn't be in here horseshittin' you on a major case like this if I didn't know you were our guy. Okay? *We know it — we can prove it. And we're gonna prove it, okay?* Now we're by that hurdle.

Eventually, Mr. Boyer asked if he was under arrest. Mr. Boyer asked this question four times, and Officer Lewis testified that he evaded answering these questions in order to prolong the interview. For example, the transcript of the tape-recorded interrogation reflects the following:

Mr. Boyer:	So I'm under arrest.
Officer Lewis:	Do you understand what I'm saying?
Mr. Boyer:	Am I under arrest?
Officer Lewis:	Do you hear what I'm saying?
Mr. Boyer:	Yeah, I hear what you're saying.
Officer Lewis:	That's where you're at. Do you think we were gonna come in here and horse shit you about a thing like this on a major crime?

(RT1 217.28). Later, during the interrogation, when Mr. Boyer again asked if he was under arrest, Officer Lewis refused to answer the question and instead responded with approximately two and one half minutes of silence. (RT1 217.33). Officer Lewis broke this silence by telling

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	What — what I want you to face up to telling me why you did it.
Mr. Boyer:	I didn't do it.
	....
Officer Lewis:	... Let's just get by arguing, you know, about you know — I didn't do it, you did — that kind of horse shit. I know you did it, okay? And I know that it be proven, you understand? We're gonna prove it, okay, and, you know, that's what you're facing. Understand?
Mr. Boyer:	I'm facing murder, I understand that.

(RT1 217.35-37).

his partner to "grab a cup" and asking Mr. Boyer his height and weight. (RT1 217.34). Mr. Boyer again asked if he was under arrest, but again Officer Lewis refused to answer the question and instead asked Mr. Boyer if that was why his girlfriend "went bananas." (RT1 217.34). Mr. Boyer was not told that he was free to go. (RT1 425, 460-61, 464).

Officer Lewis continued aggressively questioning Mr. Boyer, telling him that the police knew he had killed the Harbitzes, that they could prove it, and that the only reason for Mr. Boyer's interrogation was to learn "why" he had done it. Officer Lewis stated, "Understand what you're facing? Murder?" Officer Lewis and Mr. Boyer discussed the death penalty and Officer Lewis said it "[d]epends on why you did it." (RT1 217.32). Officer Lewis also stated: "We're gonna prove it, okay, and, you know, that's what you're facing. Understand?" (RT1 217.36). In response Mr. Boyer said: "I'm facing murder, I understand that." (RT1 217.37).

In the face of Officer Lewis's repeated accusations, Mr. Boyer invoked his right to remain silent and his right to an attorney. Officer Lewis pointedly ignored Mr. Boyer's unequivocal *Miranda* invocations, and Officer Lewis confirmed Mr. Boyer's observation that he was under arrest, as the transcript quoted below illustrates:

Mr. Boyer: Wait a minute, you're sitting there and, and you're not believing a damn word I'll tellin' you, so, how, how can —

Officer Lewis: That's because you've been lying to me. You been lying to me Rich. You know that and I know it. You've been sittin' here lying to me. How in the

hell am I gonna believe you if you keep lying to me? (long pause)

Mr. Boyer: *So, am I under arrest? I'm under arrest. For murder. (inaudible) charges.*

Officer Lewis: *That's where you're at right now.*[6]

Mr. Boyer: Can I have a phone call later?

Officer Lewis: Uh-huh (yes)

Mr. Boyer: *Well, if I'm under, I wanna lawyer —*

Officer Lewis: I didn't think that a,

Mr. Boyer: *If I'm under arrest, I wanna lawyer.*

Officer Lewis: What do you think Bill thinks of ya right now?

Mr. Boyer: Ha, he probably wants to kill me himself. *I wanna lawyer now if I'm under arrest.*

Officer Lewis: What do you mean, if you're under arrest? You saying you don't want a lawyer if you're not under arrest? That's kinda word games isn't it?

Mr. Boyer: Well I, in other words, *I don't wanna say no more, you know. Those are my rights, aren't they?*

Officer Lewis: Sure.

Mr. Boyer: And I'm not trying to get smart with you, ya know.

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[6]At the time Officer Lewis said "[t]hat's where you're at right now" Officer Lewis also "nod]ded]" his head affirmatively. (RT1 258-59, 315-16).

Officer Lewis: That's alright. (inaudible) (pause) Tell me something Rich, you think you're gonna be able to live with it. Up in your head?

Mr. Boyer: Who wants to live, shit.

Officer Lewis: Well,

Mr. Boyer: I'm facing the rest of my life in jail, or, or, or death penalty man. Ha, who wants to fuckin' live.

Officer Lewis: Um, Mr. and Mrs. Harbitz wanted to live.

Mr. Boyer: I know. I'm not saying they didn't. Everyone wants to live, really.

Officer Lewis: They wanted to live. Do you think you had the right to take their life?

Mr. Boyer: *I'm not sayin' no more.* I'm sorry. This is one a, I don't even know a word for it. (long pause)

Officer Lewis: Does your girl friend know what you did?

Mr. Boyer: I didn't even know it. How could she know?

Officer Lewis: Whatta you mean by that, explain that to me. What do you mean by that Rich?

(RT1 217.42-43).

Officer Lewis testified that at this time Mr. Boyer had invoked his right to an attorney under *Miranda*, but Officer Lewis continued the interrogation because he was "seeking an admission." (RT1 185). Officer Lewis contin-

ued the interrogation and finally, after Mr. Boyer again invoked his *Miranda* rights, Officer Lewis temporarily stopped the questioning and left the interrogation room, instructing Mr. Boyer "Okay, just sit there." (RT1 217.45). Next, Officer Lewis again interrogated Mr. Boyer, asking him when he first learned of the killings and whether he had anything to hide; in this way he extracted Mr. Boyer's "consent" for the search of his home, and then ordered Mr. Boyer to "sit tight for a few minutes." (RT1 217.45-46). Officer Lewis's partner then took Mr. Boyer to the jail where the police fingerprinted Mr. Boyer. (RT1 268, 338, 436).

When the officer returned Mr. Boyer from the jail where the police had fingerprinted him, Officer Lewis permitted Mr. Boyer to take a phone call from his girlfriend, during which Officer Lewis heard Mr. Boyer say that he was being charged with two murders. (RT1 127, 208). Officer Lewis then directed Mr. Boyer to return to the interrogation room by stating: "Why don't you step in here for a few minutes, I just want to tell you a couple things." (RT1 444). The California Supreme Court found that after Mr. Boyer was seated in the interrogation room with the door closed and Officer Lewis standing at the door, Officer Lewis "launched into a monologue on the status of the investigation. He told defendant that a newly contacted witness *disputed defendant's claim* as to the last time defendant had visited the victims' residence. Lewis then advised, in effect, that defendant was still under suspicion and that investigation of his involvement would continue. As Lewis turned away, defendant's will buckled," and Mr. Boyer said "I did it." *People v. Boyer*, 48 Cal.3d 247, 274 (1989) (emphasis in original).

After Mr. Boyer's will buckled, Officer Lewis attempted to extract a waiver from Mr. Boyer of his rights. Officer

Lewis said that Mr. Boyer had earlier "remarked something about, a, wanting to stop talking when you, talk with an attorney," and after a brief exchange the following happened.

Officer Lewis: And you're waiving your right to an attorney at this time?

Mr. Boyer: *I can't fuckin' afford an attorney, you know?*

Officer Lewis: *I'm not talking about that.* But you're voluntarily giving me these statements, a, and you already had asked for an attorney previously — you're now waiving your rights to an attorney. With the rights I just read to you.[7]

(RT1 217.48).

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[7]Among the other errors requiring reversal of Mr. Boyer's conviction and judgment of death, which the California Supreme Court did not have to reach in light of the court's holding, are the following: 1) the invalid waiver of *Miranda* rights when Mr. Boyer said he could not afford an attorney and Officer Lewis said he was not talking about that, which prevented Mr. Boyer from understanding that he had a right to appointed counsel, thereby invalidating any waiver, *see People v. Boyer*, 48 Cal.3d 247, 275 n.17 (1989); 2) the fact that Mr. Boyer's confession was involuntary because it was induced by threats of the death penalty, promises of leniency and offers of psychiatric aid in exchange for a confession; 3) the failure to stop the interrogation when Mr. Boyer said he could not afford an attorney, which constitutes an invocation of *Miranda* rights because it is inconsistent with a present willingness to discuss the case; 4) the violation of Mr. Boyer's due process rights because the police, consistent with due process, cannot tell a person he has *Miranda* rights then ignore that person's repeated attempts to exercise those same rights and then use a resulting confession against that person; 5) the *Miranda* violations, which the State essentially acknowledges, taint any subsequent confession or waiver of rights.

II

NEITHER OF THE CALIFORNIA SUPREME COURT'S INDEPENDENT BASES FOR ITS HOLDING, REACHED AFTER REVIEWING A LENGTHY FACTUAL RECORD, PRESENTS A QUESTION FOR THIS COURT TO REVIEW

A. The Court's Fourth Amendment Analysis Was Appropriate

The State's Fourth Amendment contention is puzzling. The State says that "this case presents an important vehicle for this Court to clarify that the subjective beliefs of the individual contacted by the police have no place in the Fourth Amendment analysis of whether a seizure has occurred." Cert. Petition, at 28. The State does not and cannot cite any portion of the California Supreme Court's opinion where any subjective standard was applied because the California Supreme Court applied an objective test.

The California Supreme Court applied an objective, reasonable-man standard in determining that Mr. Boyer had been illegally seized in violation of the Fourth Amendment. The court explained that: "the test of detention under the Fourth Amendment is whether a *reasonable person* in the suspect's position would have felt free to leave" and that Mr. Boyer's "interrogation occurred during an illegal, prolonged detention amounting to arrest." *People v. Boyer,* 48 Cal.3d 247, 267 (1989) (emphasis added). The California Supreme Court in its opinion repeatedly made clear that the court was applying an objective standard. *See id.* at 268 ("Under such circumstances, a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to

leave."); Modification of *People v. Boyer* Opinion, 48 Cal.3d 972a, 972b (1989) ("As we have previously noted, a reasonable person in such circumstances would only have considered himself under practical arrest.")[8]

In light of the California Supreme Court's application of an objective standard, the State's contention that this case presents an "important vehicle" to clarify that a subjective standard should not be applied is misplaced.

From the faulty premise that the California Supreme Court applied a subjective test, the State seeks to reargue the facts, but the State misreads the record. The Court applied an objective, reasonable-man standard in concluding that "many of the formal indicia of detention or arrest were present during the initial encounter with the officers, his transportation to the Fullerton station, and the ensuing interview." *People v. Boyer,* 48 Cal.3d 247, 267-68 (1989). The court at pages 267-68 noted that the following facts were in the record.

- The manner in which the police arrived at defendant's home, accosted him, and secured his "con-

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[8]The State cryptically argues that "application of the subjective test carried over to the court's analysis of whether respondent's statements were the fruit of unlawful police conduct." (Cert. Petition, at 31). This "attenuation" argument has not been preserved for review because, as the California Supreme Court found, it was not raised by the State in the trial court. *See People v. Boyer,* 48 Cal.3d at 269. This argument also fails because, for among other reasons, the California Supreme Court did not apply a subjective test and because that court found that it "could hardly have clearer proof that defendant's entire statement was the product of a will overborne during an illegal detention," (*id.* at 270), and that "there were no significant intervening events to break the chain of causation between the flagrant illegality of his custodial interrogation and his subsequent statement." *Id.* at 269.

sent" to accompany them suggested that they did not intend to take "no" for an answer.

- The situation quickly ripened into a full-blown arrest inside the station house.
- Defendant was confronted by two officers in a small interrogation room.
- He was informed of his *Miranda* rights.[9]
- He was subjected to more than an hour of directly accusatory questioning, in which Lewis repeatedly told him — falsely — that the police knew he was the killer, had all the necessary evidence, intended to charge him with the crime, and would prove his guilt in court.[10]
- Lewis first ignored defendant's questions about arrest. Then, in what appeared an immediate an-

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[9]Contrary to the evidence, the State says that when Mr. Boyer "stated he wanted an attorney and wanted to terminate the interview, it stopped." Cert. Petition, at 30. As the California Supreme Court found, the interrogating officers "pointedly ignored defendant's unequivocal attempts to assert his *Miranda* rights to silence and counsel." *People v. Boyer,* 48 Cal.3d at 262. Even after Officer Lewis left the interrogation room after Mr. Boyer's invocations, Officer Lewis returned and then questioned Mr. Boyer about knives, when he first learned of the killings and whether he had anything to hide. (RT1 217.45-46).

[10]In light of the above evidence, the State is inaccurate in stating that "there is no evidence that respondent remained in the room involuntarily or involuntarily continued to respond to the interrogation." Cert. Petition, at 29-30. The State's contention is also inconsistent with the evidence that Mr. Boyer had not been told he was free to go or that transportation home would be provided, that when Officer Lewis left the interrogation room, he directed that Mr. Boyer "sit tight" and "just sit there," and that Officer Lewis on one occasion ordered Mr. Boyer to "[g]ive me an answer."

swer to another such question, Lewis said, "That's where you're at right now."[11]

B. The Court's *Miranda* Analysis Was Appropriate

The California Supreme Court found that the "interrogating detectives pointedly ignored defendant's unequivo cal attempts to assert his *Miranda* rights to silence and counsel," and "began a new conversation about the case under circumstances reasonably calculated to elicit an incriminating response." *People v. Boyer,* 48 Cal.3d 247, 262 (1989). The State apparently finds fault with the California Supreme Court's *Miranda* analysis and says that certiorari should be granted "to clarify the scope" of *Edwards v. Arizona,* 451 U.S. 477 (1981), "as to what constitutes initiation of a conversation with police after an individual has invoked his *Miranda* rights." Cert. Petition, at 34.[12]

The State does not show that, in light of the record on appeal, the California Supreme Court erred in construing

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[11]The State is inaccurate in stating that Officer "Lewis also made statements indicating that respondent was not the sole focus of the investigation and suggesting that he was about to be released." Cert. Petition, at 32. Although the State's contention that Mr. Boyer "was about to be released" is a tacit acknowledgment that Mr. Boyer had been seized, there is no evidence of such statements and the contention conflicts with the California Supreme Court's finding that "a reasonable person could only conclude that the police deemed him their sole suspect in a double murder and would restrain and formally arrest him if he tried to leave." *People v. Boyer,* 48 Cal.3d at 268.

[12]In the California Supreme Court, the State virtually conceded *Miranda* error. As the California Supreme Court explained, if Mr. Boyer was in custody "the People acknowledge Lewis clearly violated *Miranda* when he ignored several explicit requests by defendant to remain silent and to consult a lawyer." *People v. Boyer,* at 48 Cal.3d at 272.

the concept of "initiate" within the meaning of *Edwards,* and the State does not acknowledge that the court's finding of a *Miranda* violation was not based solely on the court's interpretation of initiation. The California Supreme Court declined to rest its finding of *Miranda* error solely on its interpretation of the term initiation. In addition, the California Supreme Court found that following a lengthy accusatory interrogation — in which Mr. Boyer had been branded a liar, told that he would be proven guilty of a double murder, and, in effect, told that whether he would be sentenced to death depended on why he did it — the police improperly resumed interrogation of Mr. Boyer (within the meaning of *Rhode Island v. Innis,* 446 U.S. 291 (1980)) when Officer Lewis in effect called Mr. Boyer a liar. The following quotation from the California Supreme Court's opinion illustrates this.

> We therefore conclude, under *Edwards* and *Innis,* that defendant's statement was the result of the authorities' improper resumption of contact and questioning. The *Edwards* rule renders a statement invalid if the authorities initiate *any* "communication, exchanges, or conversations" relating to the case, other than those routinely necessary for custodial purposes. The record discloses no custodial reason why, once defendant had invoked his *Miranda* right to counsel, it was necessary to approach him again to "tell him a couple of things" about the investigation. *On this basis alone, we must find that defendant's statement contravened the requirements of Miranda.*
>
> *But Detective Lewis did more.* His aggressive, prolonged interrogation earlier in the evening was calculated to convince defendant that the police believed him a guilty liar.... [B]y confronting defendant

> once again with a discrepancy in his story, Lewis effectively invited defendant to make an "incriminating response" in violation of *Innis.*

People v. Boyer, 48 Cal.3d 247, 274 (1989) (later emphasis added).

The State does not directly contend that either of the above findings is in error. The State does not seriously dispute the California Supreme Court's finding that Officer Lewis, in violation of *Innis* and *Edwards,* improperly resumed interrogation when he, in effect, called Mr. Boyer a liar, and the State's petition entirely ignores this important fact.[13] Nor does the State's petition address the California Supreme Court's finding that Officer Lewis initiated further contacts and conversations with Mr. Boyer when Officer Lewis directed that Mr. Boyer return to the interrogation room to be advised of a few things. This is police initiation under *Edwards* using any defini-

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[13]The State's apparent contention that this Court's test for interrogation under *Rhode Island v. Innis,* 446 U.S. 291 (1980), does not apply to *Edwards* violations is put forth without any analysis or citation to authority, Cert. Petition, at 42, and in any event the State has waived any such contention because it was mentioned for the first time only in the State's Petition for Rehearing to the California Supreme Court. The authorities are also contrary to the State's argument. *See United States v. Webb,* 755 F.2d 382, 388 (5th Cir. 1985) ("The Supreme Court's interpretation of 'interrogation' [in *Rhode Island v. Innis*] as used in *Miranda* provides the framework for determining whether Webb was interrogated for purposes of the per se rule in *Edwards.*"); *United States v. Walker,* 624 F.Supp. 103, 105 (D.Md. 1985) (police act of showing defendant incriminating document after he requested an attorney constituted interrogation under *Innis* and therefore defendant's statement was taken in violation of *Edwards*); *see also Edwards v. Arizona,* 451 U.S. 477, 486 (1981); *Rhode Island v. Innis,* 446 U.S. 291, 300-01 (1980).

tion of the term. *See Oregon v. Bradshaw,* 462 U.S. 1039 (1983) (plurality opinion).

The State seems to contend that the actions of Officer Lewis in reinitiating a conversation with Mr. Boyer and interrogating him should be ignored because in response to these actions Mr. Boyer said "I did it" and therefore, according to the State, despite the repeated *Miranda* violations Mr. Boyer volunteered his confession. The State's attempt again to reargue its stilted characterization of the facts is not appropriate, especially where the California Supreme Court has already rejected the State's characterization, explaining that "[w]e decline the People's invitation to characterize the facts as they suggest." *People v. Boyer,* 48 Cal.3d at 275.

III.
CONCLUSION

Neither of the California Supreme Court's independent grounds for reversing Mr. Boyer's conviction and death sentence presents an issue for this Honorable Court. The State's petition for a writ of certiorari should be denied.

Dated: October 24, 1989

Respectfully submitted,

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